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No. 86-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*,
Petitioners
v.
JAMES P. ABOUREZK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners
v.
CITY OF NEW YORK, *et al.*

GEORGE P. SHULTZ, *et al.*,
Petitioners
v.
BRUCE CRONIN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND PEOPLE FOR THE AMERICAN WAY

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BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND PEOPLE FOR THE AMERICAN WAY

This brief *amici curiae* is filed in support of respondents on behalf of the American Association of University Professors and People for the American Way with the consent of both parties.

INTEREST OF AMICI CURIAE

Founded in 1915, the American Association of University Professors ("AAUP") is an organization of over 50,000 faculty members and research scholars in all the academic disciplines. AAUP is committed to the defense of academic freedom and the free exchange of ideas. In pursuit of this commitment, AAUP has consistently urged reform of United States immigration laws in order to facilitate visits by foreign scholars and students. A particular focus of its efforts has been the McCarran-Walter Act,[1] one subsection of which served as the basis for the denial of visas in this case.[2] Since the passage of the Act in 1952, AAUP has been outspoken in its support of modification or partial repeal.[3] Most recently, AAUP has actively supported amendments to the Act and encouraged the repeal of §§ 212(a)(27) and (28).[4]

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[1] Otherwise known as the Immigration and Nationality Act of 1952.

[2] Section 212(a)(27), 8 U.S.C. § 1182(a)(27) (1976).

[3] In that year, in fact, the AAUP passed a resolution at its annual meeting calling for "the removal of legislative and administrative barriers to the visits of foreign students and scholars to this country." *Cited in Exclusion and Deportation Amendments of 1983: Hearings on H.R. 4509 and H.R. 5227 before the Subcommittee on Immigration, Refugees and International Law of the Committee on the Judiciary of the House of Representatives*, 98th Cong., 2d Sess. 211 (1975) (hereinafter referred to as *Hearings on Exclusion and Deportation Amendments*).

[4] In 1981, the AAUP passed a resolution calling for repeal of the Immigration and Nationality Act "under which persons intending to visit this country on non-immigrant status for *bona fide* academic reasons may be denied visas because of their political beliefs or associations." *Hearings on Exclusion and Deportation Amend-*

It has intervened on behalf of foreign scholars who have been excluded from this country on the basis of their political beliefs and associations.[5] The British counterpart of AAUP, the Association of University

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ments, supra note 3 at 211. *Section 212a(a)(28) of the Immigration and Nationality Act: The Case for Repeal, Comments Submitted to the Select Commission of Immigration and Refugee Policy by the Fund for Free Expression, PEN American Center, the Lawyers Committee for International Human Rights, the Association of American Publishers, the Helsinki Watch, the American Association of University Professors, the American Association for the Advancement of Science, the American Sociological Association, the American Library Association, and the National Academy of Science (1980)*; *see also, supra* note 3.

[5] For example, on January 7, 1983, Irving J. Spitzberg, Jr., then General Secretary of the AAUP, wrote to George Shultz, Secretary of State, to express the concern of the Association over the denial of visas, under § 212(a)(27), to two Cuban philosophy professors who had been invited to participate in a conference sponsored by the American Philosophical Association. Shortly thereafter, on March 22, 1983, a similar letter was sent to the Department of State protesting the denial of a visa under § 212(a)(28), to a professor at the University of the West Indies who was scheduled to participate in a conference at the University of Cincinnati. The letter stated:

> From all that we can determine, the Department of State has refused temporary admission of this foreign scholar because of his political beliefs or associations. Plainly such grounds for denying a visa are inconsistent with the principles of a free society and incompatible with academic freedom. We do not see how such action can serve the commitment of the Department of State, in your words, to foster "objective discussion of political, economic and social concepts and issues."

Letter dated March 22, 1983 from Irving J. Spitzberg, Jr. to Secretary of State George Schultz. On February 21, 1986 AAUP's president wrote to Secretary Schultz expressing serious concern over the prospect that a visa would be denied to Dr. Joyce de Wangen-Blau, a professor at the Sorbonne and expert in the Kurdish language, who had been invited to speak in New York City at the March 22 opening of the first Kurdish library in North America. Dr. de Wangen-Blau was barred, under § 212(a)(28), from attending.

Teachers ("AUT") has described the deterrent effect of the ideological exclusion provisions on foreign scholars' willingness even to apply for American visas. The General Secretary of AUT, responding to a letter from AAUP seeking information on visa denials, stated:

> The record of actual refusals is small, not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it an anathema to have to attest as to their political views and affiliations; thus, many academics will not apply because they do not wish to place themselves in the position of signing declarations to that effect.[6]

Because of its long-standing concern about §§ 212(a)(27) and (28), AAUP participated as *amicus curiae* in the court of appeals in this case.[7]

People For The American Way is a 250,000 member, non-partisan education-oriented citizens' organization

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[6] Letter dated March 19, 1980, from Laurie Sapper (AUT) to Jonathan Knight (AAUP). Two months later then-AUT President Andrew Taylor, in declining an invitation to attend AAUP's annual meeting, described the difficulties he typically encountered with the Department of State:

> In the past I have been able to obtain a special restricted visa to attend scientific conferences but this entails a long complicated process requiring an application to be made many months in advance, the completion of very long detailed questionnaires and not knowing if I am actually going to get a visa until about four days before departing for the United States. On this occasion I obviously do not have the time to carry out all this procedure.

Letter dated May 29, 1980, from Professor Andrew Taylor to Professor Martha Friedman, *cited in Hearings on Exclusion and Deportation Amendments, supra* note 3 at 166.

[7] The AAUP also recently filed a brief *amicus curiae* in support of Professor Margaret Randall, whose application for permanent residence status has been denied due to the content of her writings. *Randall v. Meese*, Civ. 85-3415 (D.D.C.)

dedicated to protecting constitutional rights and democratic values. Since its founding in 1980, one of People For The American Way's primary objectives has been to work against censorship and promoting the free trade of ideas in academic and other settings. Two presumptions—that the government is entitled to restrict and dictate what citizens may know, and that government alone knows what is best for the people it is supposed to serve—threaten traditional liberties that are at issue in this case. People For The American Way has worked to amend the McCarran-Walter Act and repeal the ideological exclusion sections 212(a)(27) and (28). Senator Paul Simon, a leading supporter of these reforms, introduced written testimony by People for the American Way Chairman John Buchanan, entitled "Free Trade in Ideas: The Strength of the First Amendment," at a Senate hearing on that subject on August 11, 1986. The organization is currently working closely with the committees and members of Congress who seek to reform the Act during the 100th Congress and has embarked on a major public education effort to assist in this process.

STATEMENT OF THE CASE

Amici offer a brief description of some of the invitations to aliens underlying the complaints in these actions. Among the respondents in *Reagan v. Abourezk* is John Coatsworth, a history professor at the University of Chicago. Coatsworth had extended an invitation to Tomas Borge for a speaking engagement at a luncheon of University of Chicago faculty members. Reverend Harvey Cox, a professor of divinity at Harvard University, invited Borge for two meetings he had planned with religious leaders in the Boston area. In *City of New York v. Shultz*, many of the invitations to Olga Finley and Leonor Rodriguez Lezcano came from members of the academic community. The respondents in that case include Thomas Holloway, head of Cornell Uni-

versity's Latin American Studies Program; Sally McConnell-Ginet, head of Cornell's Women's Studies Program; David Rudstein, associate dean and professor of law at the Illinois Institute of Technology Chicago-Kent College of Law; Edna Acosta-Belen, head of the Puerto Rican-Latin American-Caribbean Studies Program at the State University of New York at Albany; Barbara Corrado Pope, director of Women's Studies at the University of Oregon; Mary Kay Vaughan, director of the Latin American Studies Program at the University of Illinois at Chicago; and student groups at Cornell University and the Harvard Law School. The New College of California, itself a respondent, extended an invitation in September 1983 to Finley and Lezcano to speak on the campus.

SUMMARY OF ARGUMENT

The government would have this Court approve a sweeping interpretation of § 212(a)(27) which denies citizens the opportunity to meet with aliens whose activities pose no threat of harm to the United States. The First Amendment does little if it does not protect citizens' rights to debate with these invited visitors. Opportunities for personal discourse are central to scholarly activity, and academic freedom is itself a special concern of the First Amendment.

The government justifies its intrusion on the ground that the visa denials send a foreign policy message of official disapproval of certain policies. Apart from whether any unambiguous message was conveyed by the visa denials at issue, the government's purpose is fundamentally illegitimate, as prior rulings of the Court demonstrate. In burdening the visa application process with its own symbolic message, the government upends the First Amendment rights of scholars and other citizens. The foreign policy context of the case does not deprive the Court of the power to strike down this abuse.

ARGUMENT

The government devotes only a footnote to its brief to the constitutional issues in this case. Pet. Br. 36-37 fn. 19. Even if the Court's resolution does not speak directly to the constitutionality of § 212(a)(27), the First Amendment considerations should inform the construction of the statute. Immigration cases make clear that the courts should adopt a narrow reading of the statute if necessary to "save" its constitutionality. *See Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957); *Bridges v. Wixon*, 326 U.S. 135, 147-49 (1945). Amici submit that the statute as interpreted by petitioners cannot withstand a First Amendment challenge.

I. Section 212(a)(27) Infringes Academic Freedom in Barring Discourse Among Scholars on Ideological Grounds.

The government seeks approval for a system that denies scholars and other citizens access to aliens holding points of view disfavored by the Administration. This interpretation of § 212(a)(27) has a grave impact on activities protected by the First Amendment. The underlying philosophy represented by the First Amendment is a belief "in the power of reason as applied through public discussion" [8] and that "the ultimate good desired is better reached by free trade in ideas." [9]

The First Amendment protects not only speech and other expressive activities but also the right to receive information and ideas. As the Court indicated in *Stanley*

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[8] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[9] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. joined by Brandeis, J., dissenting).

v. Georgia, the right to convey information "necessarily protects the right to receive" it as well. 394 U.S. 557, 564 (1969), quoted in *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). Discussion and debate by their very nature cannot be solitary activities. As Justice Brennan observed, concurring in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *See Procunier v. Martinez*, 416 U.S. 396 (1974); *Abourezk v. Reagan*, 592 F. Supp. 880, 886 (D.D.C. 1984). The right to receive information protects not only public debate but also the exchange of ideas among scholars. Represented among the plaintiffs bringing this action are American scholars, whose academic freedom is vital to the strength of the nation. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Court spoke to the First Amendment's special protection for academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' (Citation omitted).

Debate, discussion, and the testing of ideas stand at the center of the search for truth and understanding. Several recent decisions, drawing on *Keyishian* and the earlier views of Justice Frankfurter, *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1951), reflect the Court's continuing concern for academic freedom. Writing for eight members of the Court in *Regents of the University of Michigan v. Ewing*, 106 S. Ct. 507, 514 (1985), Justice Stevens stressed the Court's special responsibilities

under the First Amendment toward academic freedom. Justice Powell, concurring in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-314 (1978), spoke of the ways in which diversity enriches scholarship and learning. He drew support from, in addition to *Keyishian* and *Sweezy*, a passage about legal education in *Sweatt v. Painter*, 339 U.S 629, 634 (1950), which has the same force in the context of this case:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Isolation and censorship are antithetical to understanding and progress. The Court has observed that the protection of debate in educational settings merits especially careful protection "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). *See also Board of Education v. Pico*, 457 U.S. 853 (1982); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960).

The government's interpretation of § 212(a)(27) makes a mockery of these values, by denying Americans the opportunity for direct contact with foreign scholars and other visitors solely because those invited have ideas and affiliations in official disfavor with the government. The United States is left in the anomalous position of championing, in the abstract, the freedom of speakers and audiences while at the same time barring their direct contact.

II. Sending Foreign Policy Messages of Disapproval Is Not A Sufficient Rationale for Infringement of Academic Freedom.

The government and Judge Bork in dissent rely heavily on *Kleindienst v. Mandel* for the proposition that the Court must defer to a "facially legitimate and bona fide reason" proffered for government foreign policy actions which impair citizens' fundamental interests. Cert. Pet. 17, 60a. Yet the justification put forward for the instant visa denials is insufficient under either the limited *Kleindienst* standard, itself of questionable vitality, or a more exacting standard.

a) Signaling disapproval is not a facially legitimate rationale.

The reason the government advances for the visa denials is essentially identical to rationales which this Court has rejected in earlier cases. The explanations given by then-Under Secretary of State for Political Affairs Lawrence S. Eagleburger, in unclassified and declassified affidavits, were based on the notion that by granting or denying a visa the United States can signal its disapproval of certain policies. Judge Bork quoted from an unclassified affidavit:

> [T]he issuance, denial or revocation of a NIV to a particular alien can have significant diplomatic or foreign policy ramifications to the extent that the issuance or denial *is construed* as an act of the United States Government. Thus, for example, the issuance or denial of a visa to a foreign government official *may be taken* by the alien's government as a reflection of United States foreign policy vis-a-vis that government and may result in reciprocal action or retaliation by that government. Similarly, the denial of visas to foreign government officials is one of the tools available to a government to communicate its attitude about the policies of other states.

785 F.2d at 1076 (emphasis added) (J.A. 57-58). In the declassified affidavits Eagleburger stated that a visa de-

nial is "viewed by other Central American countries as reflecting United States foreign policy orientation," and that granting a visa would have "sent a very wrong message." Pet. App. 86a, 87a. A visa denial, he suggests, avoids conferring "the aura of legitimacy" on the alien's government. Pet. App. 90a.

In short, the asserted basis for exclusion involves no suggestion that the applicants would engage in activities harmful to the United States nor create any risk to the national security. The government rather taints our ability to defend ourselves as an open society by turning the exclusion of selected individuals into an official symbol. Contending that this provides a facially legitimate and bona fide reason under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the government argues that this Court must defer to its decisions. Brief for Pet. at 33. Yet the Court has soundly rejected a "signalling" rationale as justifying abridgement of First Amendment rights in analogous contexts. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court struck down a state university's denial of the use of campus facilities to a student religious group. Non-religious student groups received access to the facilities, but the university argued that providing access to the religious group would amount to an endorsement of the group's purposes, in violation of the Establishment Clause. Justice Powell, writing for seven members of the Court, expressly rejected the notion that access made available on a neutral basis could be construed as an official endorsement, stating that "an open forum in a public university does not confer any imprimatur of State approval" on the groups availing themselves of access. 454 U.S. at 273, 274. A neutral policy of access, protecting the First Amendment rights of American scholars and other citizens, would not of its own force suggest official endorsement of any alien's views.

Healy v. James, 408 U.S. 169 (1972), also counsels against construing access as endorsement. In *Healy*, the Court found unconstitutional a state college's denial of official recognition to a local chapter of Students for a Democratic Society. The college had argued that, although withholding its official "stamp of approval," it posed no obstacle to this group's leafletting and meetings off of the campus. The college president's unwillingness to "sanction" the principles of the organization through official recognition gave the Court little pause. The First Amendment does not immunize governmental actions undertaken to signal disapproval, and Justice Powell's majority opinion observes that the college, "acting here as an instrumentality of the State, may not reject speech or association simply because it finds the views expressed by any group to be abhorrent." 408 U.S. at 187-88.

A brief but significant moment in the history of Harvard University also illustrates the danger of treating individual belief and speech as a vehicle for expression of institutional policy. In 1917 President Lowell rejected suggestions that a pro-German professor be dismissed from the faculty, stating that responsibility for the public statements of its professors would not be assumed by the institution. To do otherwise would be unwise, Lowell explained, because once done the institution would thereafter assume responsibility for all that it permitted the faculty to say.[10] More recently, AAUP responded to instances in which audience disruption forced cancellation of campus speeches by the United States Ambassador to the United Nations by invoking the principle that access to an open forum implies neither agreement nor disagreement with what is said.[11] A policy of neutrality deflates arguments that would attribute views

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[10] W. Metzger, Academic Freedom in the Age of the University 228-29 (1955).

[11] The Chronicle of Higher Education, April 6, 1983, at 11.

of the individual to the institution. Thus a politically neutral non-immigrant visa system, respecting citizens' access to ideas, could not be construed as official endorsement of the beliefs of those allowed entry. Conversely, a visa system burdening citizens' rights only to signal official disapproval lacks facial legitimacy under *Kleindienst.*

b) The message of disapproval is vague and ambiguous.

The foreign policy message supposedly conveyed by the visa denials at issue is itself vague and ambiguous. The actual experience of the four visa applicants and *Healy v. James*, 408 U.S. 169 (1972), discussing "guilt by association," both demonstrate the shallow content of the message.

At least three of the four guests invited by the plaintiffs received visas to travel in the United States either before or after the denials at issue.[12] In light of this inconsistency the government's purported message of disapproval can hardly be viewed as "an important tool of foreign policy," as petitioner's brief would have it. At 36.

Assuming *arguendo* the legitimacy of basing visa denials on political beliefs to convey a message, any message that can be discerned here is itself amorphous. *Healy v. James*, 408 U.S. 169 (1972), underscores this point. The college president in *Healy*, aware that some SDS chapters elsewhere had been associated with violent acts, considered the affiliation of the local group with the organization to be a sufficient basis for denial of recognition. The Court refused to endorse such "guilt by association", without an individualized showing that the association posed the threat feared by the government. 408 U.S. at 186. Here the government has offered little

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[12] *Hearings on Exclusion and Deportation Amendments, supra* n.3 at 167 (1975).

to support its assertion that excluding an alien will send a message of disapproval. The process of visa denials under § 212(a)(27) is most often secret, raising real questions about how a message will be conveyed; to whom it will go; and which of the applicant's various beliefs and associations will be viewed as the one giving offense.

c) The government has suitable alternatives while the would-be hosts do not.

The offensive use of visa denials is an insignificant means among the many at the government's disposal for conveying official foreign policy positions. *Kleindienst* would make examination of these alternatives irrelevant, but amici submit that *Kleindienst* itself should be limited or overruled.

The divided and questionable resolution of *Kleindienst* may be read as grounded on the past visa abuses of the applicant. A history of such abuse might indeed be a facially legitimate rationale for a later visa denial. The Court should allay the "general sense of judicial confusion" [13] arising from *Kleindienst* and reassert the vitality of the First Amendment where the rights of citizens are infringed in the name of foreign policy. See *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (opinion of Brennan, J.) (considerable discretion vested in state and local authorities does not preclude scrutiny under First Amendment). While the Court is perhaps not well-equipped to judge the substance of foreign policy decisions, matters of foreign affairs are not therefore wholly beyond its reach. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 55 U.S.L.W. 4313 (March 10, 1987); *Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2866 (1986). As one commentator has observed, "by guaranteeing that the power to

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[13] S. Shapiro, *Commentary, Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 936 (1987).

shape foreign policy does not also include the power to shape foreign policy debate, the courts are arguably promoting important separation of powers principles." [14]

Eliminating the practice of denying visas on the grounds of the applicant's ideology would hardly hinder the government's ability to convey its foreign policy concerns. The government is well situated to express its disagreement with the visitor's views to the American hosts, the visitor's government, neighboring countries, or elsewhere, through many avenues of communication. The President, the Secretary of State, and American ambassadors and foreign service officers around the globe are available directly to convey official views orally and in writing. In light of the country's extensive foreign policy apparatus, surely the strength of our international position does not turn on a handful of visa denials to which the government has over zealously attached a symbolic meaning.

For the would-be hosts, satisfactory alternatives to face-to-face contact with invited aliens are not available. Denying entry to the visitors works a serious hardship on the hosts' receipt of ideas and information. As acknowledged by the district court, it is no answer to say that mail and other means of communication provide a suitable substitute for face-to-face contact with the excluded invitees. Pet. App. 76a. As the Court observed in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), "[t]his argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning." Personal contact is indispensable to political and academic discussion and debate. As Einstein said in accepting an invitation to lecture at the University of Leiden, "[i]n these unfinished things, people understand one another with difficulty unless talking face

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[14] *Id.* at 944-45.

to face." [15] The record in this case [16] reinforces the point made by J. S. Mill's *Essay on Liberty*. For one who seeks to explore the truth of his own beliefs, countervailing points of view must be brought

> into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.

43 *American State Papers* 284 (1952). Mill's point carries special force in the particular setting of this case. Because the government has a superior ability otherwise to "represent" what is going on abroad, to curtail travel outside the country, and to control the flow of ideas in other ways, it is even more imperative that citizens' access to persons willing and able to respond to their invitations to meet with them and to confront them here in the United States be preserved.

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[15] *Developments in the Law—National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1154 (1972).

[16] The Declaration of Thomas H. Holloway, a faculty member at Cornell University, states:

> In keeping with the principles of academic freedom, exchange of ideas, and open debate, learning of the views of these speakers through impersonal means is an inadequate substitute for face-to-face contact. Speakers are not invited to deliver information to passive audiences, but to raise issues for discussion. Such a purpose can only be fulfilled by bringing speakers and audience together in direct personal contact.

Para. 5 (page 237 in the court of appeals appendix).

CONCLUSION

Amici urge the Court to constrain the government's sweeping interpretation of the law which, in the name of plenary executive authority in foreign policy, infringes freedoms of debate and discussion protected by the First Amendment.

Respectfully submitted,

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